90-1836

NO.

Supreme Court, U.S.
FILED
MAY 23 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HETTIE M. MINNICKS,
as Executrix of the Succession
of Stephen A. Mistich
Petitioner,

versus

BRANDON L. MISTICH,
REBECCA MISTICH TERRASE,
and PATRICIA MONROE MISTICH, as natural tutrix
of SHAWN A. MISTICH
Respondents.

Petition on Behalf of Hettie M. Minnicks,
as Executrix of the Succession of Stephen A. Mistich,
For Writ Of Certiorari To The Louisiana State Court
Of Appeal, Fourth Circuit

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QUESTIONS PRESENTED FOR REVIEW

In a Jones Act and general maritime law personal injury case in state court under the "saving to suitors" clause, when the plaintiff seaman dies after award of a final judgment in his favor:

1. Does federal maritime law or state law determine the substantive beneficiary of the final judgment?

2. Does federal maritime law designate the seaman's estate as the substantive beneficiary of the final judgment?

PARTIES TO THE PROCEEDINGS

Hettie M. Minnicks
Brown and Root, Inc.*
Brandon L. Mistich
Rebecca Mistich Terrase
Patricia Monroe Mistich, as natural tutrix of Shawn A. Mistich

*Its parent company is Halliburton, Inc.; its partially owned subsidiaries are:

Brown & Root Constructores Petroleros de Venezuela, C.A.
Brown & Root Do Brasil Servicos Maritimos Ltda.
Brown & Root Ingenieros Petroleros de Venezuela, C.A.
Brown & Root (Malaysia) Sdn. Bhd.
Brown & Root - Malta Limited
Brown & Root Nigeria Limited
Brown & Root - Saudi Limited
Constructora Indolatina, S.A. de C.V.
Constructores de Venezuela, Brown & Root, Inc., C.A.
Halliburton Holdings, Inc.
Manteniven, S.A.
Martec-Engenharia & Obras Ltda.
P.T. Brown & Root Indonesia
SBR Offshore Limited

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1. April 28, 1989 judgment in favor of original plaintiff Stephen A. Mistich in the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, Case Number 29-703, *Stephen A. Mistich v. Pipelines, Inc., et al.* (Appendix, page A-1)

2. January 8, 1990 order of the Louisiana Court of Appeal, Fourth Circuit, Case Number 89-CA-1420, *Stephen A. Mistich v. Brown & Root, Inc.*, substituting the adopted children Brandon L. Mistich et al. in place of the deceased original plaintiff. (Appendix, page A-4)

3. December 28, 1990 denial by the Louisiana Court of Appeal, Fourth Circuit, in the same case, of the executrix of the estate of Stephen A. Mistich's Petition of Intervention, as the beneficiary in interest of the April 28, 1989 judgment in favor of Stephen A. Mistich (Appendix, page A-6)

4. February 22, 1991 denial by the Supreme Court of the State of Louisiana, Case Number 90-OC-0164, *Stephen A. Mistich v. Brown & Root, Inc.*, of application for a writ of certiorari, (page A-7)

JURISDICTION

Sought to be reviewed is the December 28, 1990 order of the Louisiana Court of Appeal, Fourth Circuit, denying the intervention of the deceased seaman's executrix to be the beneficiary in interest of the judgment awarded the seaman while he was alive (Appendix, page A-6). The Louisiana Supreme Court denied the executrix's application for a writ of certiorari on February 22, 1991 (Appendix, page A-7).

Suit was originally brought in 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, Case Number 29-703, under the Jones Act, 46 U.S.C. § 688, the general maritime law, and the "saving to suitors" clause, 28 U.S.C. § 1333 (1). In this Jones Act and general maritime law case, the seaman brought suit for and was awarded damages caused by his employer's negligence and the unseaworthiness of the vessels on which he was employed. Jurisdiction in this Court is founded upon this Court's final review of admiralty and maritime causes, United States Constitution, article III, § 2, clause 2, and upon 28 U.S.C. §§ 1257 and 2104.

STATUTES INVOLVED

1. U.S. Constitution, article I, § 8, clause 3 (Commerce)

[3.] To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

2. U.S. Constitution, article III, § 2, clause 1 (Admiralty and Maritime Jurisdiction)

[1.] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all cases affecting Ambassadors, other public Ministers and consuls;-to all Cases of admiralty and maritime Jurisdiction;-to controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and citizens of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

3. U.S. Constitution, article VI, clause 2 (Supremacy)

[2.] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

4. 46 U.S.C. § 688

688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in case of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which is principal office is located.

5. 28 U.S.C. § 1333

1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

6. Federal Rule of Appellate Procedure Rule 43. Substitution of Parties

(a) Death of a party.-If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or, if there is no personal representative by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.

7. Federal Rule of Civil Procedure Rule 25. Substitution of Parties

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution

is made not later than 90 days after the death is suggested upon the records by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

8. Uniform Rules of Louisiana Courts of Appeal, Rule 2-9

Rule 2-9. Substitution of Parties

The rules and procedures for substitution of parties provided by LSA-C.C.P. Arts. 801-807 shall regulate the substitution of parties.

9. Louisiana Code of Civil Procedure Article 801

Art. 801. Voluntary substitution for deceased party; legal successor

When a party dies during the pendency of an action which is not extinguished by his death, his legal successor may have himself substituted for the deceased party, on ex parte written motion supported by proof of his quality.

As used in Articles 801 through 804, "legal successor" means:

(1) The survivors designated in Article 2315.1 of the Civil Code, if the action survives in their favor; and

(2) Otherwise, it means the succession representative of the deceased appointed by a court of this state, if the succession is under administration therein; or the heirs and legatees of the deceased, if the deceased's succession is not under administration therein.

10. Louisiana Civil Code Article 2315.1

Art. 2315.1. Survival action

A. If a person who has been injured by an offense or quasi-offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi-

offense, shall survive for a period of one year from the death of the deceased in favor of:

(1) The surviving spouse and child or children of the deceased, or either the spouse of the child or children;

(2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving; and

(3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

B. In addition, the right to recover all damages for injury to the decedent, his property or otherwise, caused by the offense or quasi-offense, may be urged by the decedent's succession representative in the absence of any class of beneficiary set out in the preceding Paragraph.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

D. As used in this Article, the words "child," "brother," "sister," "father," and "mother" include a child, brother, sister, father, and mother, by adoption, respectively.

STATEMENT OF THE CASE

The original plaintiff, seaman Stephen A. Mistich, filed suit on December 2, 1986 against defendant Brown and Root, Inc. and other defendants, solely under the Jones Act and the general maritime law. The suit was for personal injury damages resulting from plaintiff's employment by defendants on pipe-laying vessels. The personal injury had been caused by plaintiff's exposure to welding-inspection x-ray radiation over a period of several years. During this period, plaintiff worked on the vessels predominantly in high seas locations. Suit was filed, under the saving to suitors clause, in the 25th Judicial District Court for the

Parish of Plaquemines, State of Louisiana. All defendants except Brown and Root, Inc. settled with plaintiff and were dismissed prior to trial.

On April 28, 1989, after trial on the merits, final judgment for $7,147,608.00 was rendered in favor of the original plaintiff while he was alive. Then, *after final judgment*, he died on May 14, 1989. Thus here there is no survival or wrongful death action involved. The plaintiff's personal injury causes of action were merged into his judgment. The judgment was his property right and at death became part of his estate.

Defendant Brown and Root, Inc. took an appeal to the Louisiana Court of Appeal, Fourth Circuit. On January 4, 1990 the adopted children of the plaintiff, the respondents, as statutory survival beneficiaries under La. C.C. Art. 2315.1 moved to be substituted for the deceased plaintiff as parties plaintiff-appellees. On January 8, 1990 the Court of Appeal ordered said children substituted in place of the deceased original plaintiff.

In short, contrary to clearly applicable federal law, the state court applied the state survival statute to a federal maritime non-survival case.

On April 4, 1990 Hettie M. Minnicks, the mother of the deceased original plaintiff, was confirmed as ancillary executrix for his Louisiana succession and she moved to be substituted as the plaintiff-appellee.

On June 1, 1990 the Court of Appeal denied the executrix's motion to substitute, citing only *Nathan v. Touro Infirmary*, 512 So.2d 352 (La. 1987), a La. C.C. Art. 2315, tort *survival* action case, and thus again treated a federal maritime non-survival case as a state survival case. On September 14, 1990, the Louisiana Supreme Court without explanation denied supervisory or other writs directed to the Court of Appeal.

Since the state order was not clear as to whether it determined mere procedural capacity or whether it determined the substantive beneficiary in interest in the lawsuit, the executrix inter-

vened on November 14, 1990 as substantive beneficiary of the decedent's judgment. On December 22, 1990 the Court of Appeal denied the intervention. This state ruling deprived the seaman's estate of his substantive federal maritime judgment. This state ruling is the subject of this petition.

Petitioner on December 14, 1990 had filed a petition to this United States Supreme Court in Case No. 90-1082 for a writ of certiorari to the Court of Appeal for its denial of the executrix's motion to substitute as the proper party. This Court denied writs on the motion to substitute on February 19, 1991, apparently because the matter of the executrix's substantive intervention was still pending before the Louisiana Supreme Court.

However, on February 22, 1991 the Louisiana Supreme Court denied petitioner's application for a writ of certiorari on the denial of her intervention. So the state court of last resort has now ruled on this substantive issue. The state court has applied state law to deprive the seaman's estate of the final judgment awarded, solely under federal maritime law, to the living seaman in his own right. The state court has applied state law solely because this is a saving to suitors clause case. Had this action been brought in federal court, federal maritime law would have been applied. This is an impermissibly intrusive and unprecedented denial of the seaman's federal maritime substantive rights which belong to his estate as the continuation of his legal person.

The seaman had previously been diagnosed as suffering with terminal leukemia and as having only a very limited time remaining to live. He, shortly before the trial, executed on March 3, 1989 a last will and testament which substantially excluded his adopted children and left most of his estate to three of his closest relatives: his mother, sister, and brother. The only asset of real value to be distributed by the will was his potential judgment in this personal injury action. At that time no defendant had settled.

This will was filed for probate on May 30, 1989 and ordered probated on August 30, 1989 in the Superior Court of California

for the County of Orange, where the seaman was domiciled. The judgment and a partial pre-trial settlement were included in the Inventory and Appraisement of the estate filed in that proceeding on November 6, 1989. Under California law the judgment belongs to the seaman's estate.

The deceased had no wife or natural children. The adopted children were his former wife's children from her prior marriage. The plaintiff had adopted them only eleven months before he and his former wife separated on November 1, 1980. They were divorced on April 19, 1982, the wife not seeking nor being awarded child or other support, but receiving full custody of the children. Thereafter, although two of them became majors, the children did not support him when he was in financial need. He had had no significant contact with them for several years before his death. If the state court denial of the executrix's intervention determines the ultimate beneficiaries of this personal injury lawsuit, then the most significant property right possessed by the plaintiff-seaman at his death, his maritime personal injury judgment, will not be distributed according to his will. On the other hand, if this judgment is a right of his estate, it will be transmitted according to his solemn will to legatees other than his children. *Whether these children are proper survival or wrongful death beneficiaries is a question completely unrelated to the case herein.* Under federal law the personal injury judgment is a property right of the estate, being the fruits of the seaman's own federal maritime personal injury action. A subversion of the express will of the deceased seaman through the application of state law to this federal maritime case should not be allowed.

Clearly had the plaintiff survived past the appeal and then died after recovering on his judgment, these funds as part of his estate would be distributed according to his testament. In fact, the funds from the plaintiff's partial pre-trial settlement with the other defendants were sent, by the respondents' counsel without objection, to the estate. Is it reasonable the *actions of the de-*

fendants in settling or in appealing should *determine the ultimate beneficiary* of the plaintiff's federal maritime rights? For, if the defendant had settled or had not appealed, the recovery without challenge would have been an asset of the seaman, and at his death, of his estate. It is submitted that this Court should preserve the seaman's rights to his estate and preserve the needed uniformity of substantive rights under federal maritime law.

FEDERAL QUESTION RAISED TIMELY

The federal questions sought to be reviewed were raised in petitioner's November 14, 1990 Memorandum in Support of Petition of Intervention, on page 6, where petitioner stated "federal maritime law should clearly have applied to this substantive issue" of "who is the real party in interest" to receive the benefits of the federal maritime, saving to suitors clause cause of action. The federal questions were also raised in petitioner's Application for Writ of Certiorari or Review to the Louisiana Supreme Court filed January 17, 1991.

ARGUMENT

I. ***Whether federal maritime law or state law determines who is the substantive beneficiary of the final judgment.***

Two of the considerations in favor of granting certiorari are presented by this petition: a conflict between the state court action and Federal Courts of Appeals; and a conflict between the state court action and this Court. See U.S. Supreme Court Rules 10.1 (b) and (c).

In this case the state court has applied Louisiana law to determine the question of ultimate beneficiaries under the Jones Act, 46 U.S.C. § 688, and general maritime law. It is petitioner's position that federal law should apply to this question.

The state court order clearly conflicts with decisions of this Court, of the United States Courts of Appeals, and of other courts which have uniformly held that, in maritime actions in state court under the saving to suitors clause, federal maritime law governs over state law which interferes with substantive maritime rights.

Excluded from this discussion are distinguishable cases where state law has not been preempted in maritime cases because of recognized exceptions not present in the instant case.[1] Distinguished first are cases where state law is *adopted* to fill the gaps where there is no federal law on point by virtue of the interstitial nature of federal law, *e.g., Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955) (insurance contract for houseboat on land-locked lake); and *Baggett v. Richardson*, 473 F.2d 863 (5th Cir. 1973) (state tort law adopted for maritime beating). Distinguished second are cases where the state law regulates behavior in which the state has an especially strong regulatory interest, *e.g., Askew v. American Waterways Operators*, 411 U.S. 325, 93 S.Ct. 1590, 35 L.Ed.2d 280 (1972) (Florida oil spill pollution regulations).

Also distinguishable are cases in which state law was used to *supplement* the remedies available in admiralty for the vindication of maritime rights, *e.g., Just v. Chambers*, 312 U.S. 383, 668, 61 S.Ct. 687, 85 L.Ed. 903 (1941); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 44 S.Ct. 274, 68 L.Ed. 582 (1924).

Simply stated, if this maritime case had been heard in federal court, the substantive beneficiary of the judgment would be the seaman's estate. A different substantive result should not follow because this action was brought under the saving to suitors clause in state court.

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[1] See *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), *reversed on other grounds*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988) for a discussion of these recognized exceptions.

A. Federal maritime law, not interfering state *substantive* law, governs a seaman's substantive maritime rights.

It has long been held that federal maritime law governs all substantive rights in cases falling within the admiralty and maritime jurisdiction of the federal courts, to the exclusion of interfering state law. *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1171 (1918), quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215, 216, 37 S.Ct. 524, 528, 61 L.Ed. 1086 (1917) with reference to the U.S. Constitution article I, § 8, clause 3 (Commerce) and article III, § 2, clause 1 (Admiralty):

> [I]t must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. . . . and further, that in the absence of some controlling statute, the general maritime law, as accepted by the federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction.

In the *Chelentis* case, this Court, further quoting *Southern Pacific Co.*, stated that the "saving to suitors" clause[2]:

> [G]ave no authority to the several states to enact legislation which would work "material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations."

In *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834 (1920), this Court held that state workers compensation laws constitutionally could not take away substantive rights under federal maritime laws.

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[2] 28 U.S.C. 1333 (1). See *Madruga v. Superior Court*, 346 U.S. 556, 560, n. 12, 74 S.Ct. 298, 300, n.12, 98 L.Ed. 290 (1954).

The Federal Circuit Courts of Appeals have likewise held that federal law, not state law, governs substantive maritime rights: *Moore-McCormack Lines v. Amirault*, 202 F.2d 893 (1st Cir. 1953) (allowance of prejudgment interest determined by federal law in general maritime personal injury and property actions); *Branch v. Schumann*, 445 F.2d 175 (5th Cir. 1971) (defendant's standard of care determined by general maritime law); *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974) (a general maritime personal injury case not governed by Arkansas state statute limiting recovery by social guests on boats to willful and wanton disregard of rights of others); *Pastore v. Taivo Gyogzo*, 571 F.2d 777, 784 (3rd Cir. 1978) (questions of contribution and indemnity rights governed by federal not state law); *Everett v. Carnival Cruise Lines*, 912 F.2d 1355 (11th Cir. 1990) and *Wilkinson v. Carnival Cruise Lines*, 920 F.2d 1560 (11th Cir. 1991) (federal maritime law governs substantive legal issue of standard of care of shipowner).

The *Pastore* case holding that questions of indemnity in a Jones Act and saving to suitors clause case must be decided under federal law, is the perfect counterpart to what is involved in this case. Indemnity has to do with *who* will be ultimately liable; and this case has to do with *who* will be the ultimate beneficiary of the judgment recovery.

It is a "constitutional truism" that "state legislation is clearly invalid where it actually conflicts with the established general maritime law or federal statutes." States may not "flatly contradict established maritime law" nor "interfere with the uniform working of the federal maritime legal system." G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, 2d ed., § 1-17, at 48-50 (1975). The saving to suitors clause "does not authorize the application of substantive rights created by state statutes that significantly

modify or change the national substantive maritime law that otherwise would be applicable." C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICEAND PROCEDURE, § 3672 (1985).

In the present case, the respondents rely upon La.C.C. Art. 2315.1, which designates the state *survival* beneficiaries as the parties to be substituted. This same survivorship provision, previously contained in Art. 2315, was held to be a "rule of substantive law" and was also held, under the U.S. Constitution, articles VI (Supremacy) and III, § 2 (Admiralty), to be inapplicable to a federal maritime personal injury claim. *Roberson v. N.V. Stoomvaart Maatschappij*, 507 F.2d 994 (5th Cir. 1975).

Also see *Taylor v. Taylor*, 232 U.S. 363, 34 S.Ct. 350, 352, 353, 58 L.Ed. 638 (1914), a Federal Employees Liability Act (FELA; incorporated by reference into the Jones Act) wrongful death and survival case holding that the New York State succession law was preempted by the FELA grant of the right of action to specified parties. The court stated that "the source of the right of plaintiff . . . was the Federal statute" and "'the laws of the states, in so far as they cover the same field, are superseded.'". Similarly in our case federal law clearly placed the substantive judgment right in the seaman, and subsequently in his estate, and this right is supreme over any interfering state law.

If the seaman herein had died *before* final judgment, then federal maritime law would govern and designate the beneficiaries of the survival actions which would have arisen. Similarly, if the seaman herein had died *after* the appeal, then federal maritime law would also have preserved his judgment rights to himself, and to his estate. It is wholly illogical to allow state law to intrude in the present case, which falls chronologically in between these two situations.

This same situation as the present case did arise in *Connors v. Gallick*, 339 F.2d 381, 386 (6th Cir. 1964), a FELA personal injury case in which, as here, the plaintiff received a personal injury final judgment in his lifetime. The FELA survivorship provision, which would have designated the plaintiff's daughter

as beneficiary, was found *not* applicable to the judgment proceeds. Rather, federal law was found to place the judgment rights in the plaintiff's estate, since his "causes of action ha[d] been merged in his judgment" and the judgment "became part of his estate." But the state courts below have not followed this federal law.

An analogy could be drawn to a *wrongful death* or *survival* Jones Act and general maritime law claim filed under the saving to suitors clause in the court of a state whose laws designated the deceased's cousin as the designated beneficiary of the action. Surely we would not suffer the argument that state law should dislodge the Jones Act and general maritime law designated beneficiaries. In all three situations (wrongful death, survival, and the present case) the question is the same. The public policy of uniformity represented by a single maritime rule for who is the substantive beneficiary of a seaman's final judgment, *i.e., who is entitled to his judgment,* carries a strong regulatory interest of the United States, not of the individual states. These matters of federal law require uniform application to facilitate maritime commerce. Further, such a question is surely a matter of substance, not procedure.

B. Federal maritime law, not interfering state *procedural* law, governs a seaman's substantive maritime rights.

Assuming *arguendo* that the interfering state law is procedural, still the estate's entitlement to the judgment the seaman obtained while alive is a substantive maritime right, and so federal maritime law would govern over interfering state procedural law. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245, 63 S.Ct. 246, 251, 87 L.Ed. 239 (1942) (concerning a Jones Act personal injury claim brought in state court under the saving to suitors clause). In *Garrett* this Court reversed the Pennsylvania Supreme Court which had held as procedural, and determined by state law, the question of the burden of proof on whether a seaman's release was valid, and held this matter substantive *in its*

effect and so controlled by federal law, stating:

> The source of the governing law applied is in the national, not the state, governments. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. . . . So here, in hearing this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected.

Similarly, this Court refused to apply Pennsylvania state contributory negligence law to a general maritime law unseaworthiness and negligence claim, as here, in place of maritime comparative negligence. In *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409, 410, 74 S.Ct. 202, 205, 98 L.Ed. 143 (1953) this Court stated: "While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court."

In *Pope*, this Court stated that a maritime tort is "a type of action which the Constitution has placed under national power to control in its substantive as well its procedural features," quoting *Panama R. Co. v. Johnson*, 264 U.S. 375, 386, 44 S.Ct. 391, 393, 68 L.Ed. 748 (1924). *Panama R. Co.*, as here, was a Jones Act personal injury suit.

The Federal Courts of Appeals have followed this same course. In *J.B. Effenson Co. v. Three Bays Corp.*, 238 F.2d 611, 615 (5th Cir. 1956) the court held that a maritime right is governed as to a limitation of actions issue "by the maritime law", explaining:

> Such law is that which the Congress has enacted or the Federal courts, sitting in admiralty or in the exercise of their maritime jurisdiction, have declared and would apply.... The maritime principles would prevail even though the action were brought in a state court. [citation omitted] They are "common law remedies" which may be had, where available, but maritime rights which are redressed.

Similarly, in *Oroz v. American President Lines*, 259 F.2d 636, 638 (2nd Cir. 1958), the issue of the time within which a general maritime law personal injuries suit must be commenced was held governed by general maritime law, not a local state statute of limitations. This was the case even though the statute of limitations was characterized as procedural under state law. It was stated that "Admiralty principles govern the civil action and override common law rules such as those concerning contributory negligence, burden of proof, and assumption of the risk even though these rules are often characterized as 'procedural' or 'remedial.' "

The 3-year federal statute of limitations, not the 6-year Maine state law, governed a maritime personal injury action in *Butler v. American Trawler Co.*, 887 F.2d 20, 21 (1st Cir. 1989). The court stated "the relevant question is not whether the federal limitations statute [citation omitted] is 'substantive' or 'procedural,' but whether Congress intended that statute to preclude the operation of different state limitations statutes in respect to maritime torts. We believe that it did."

In *J. Ray McDermott & Co. v. Vessel Morning Star*, 457 F.2d 815, 818 (5th Cir. 1972) *(en banc)*, *cert. denied*, 409 U.S. 948, 93

S.Ct. 271, 292, 34 L.Ed.2d 218 (1972), a maritime contract case, it was held that a maritime statute, "when read together with the statutes delineating the judicial sale procedure in the federal courts, forms a comprehensive *procedure*." There the Louisiana deficiency judgment statute was not allowed to affect the "uniform *application*" of the federal maritime statute [emphases added].

In *Byrd v. Byrd*, 657 F.2d 615, 617 (4th Cir. 1981), a general maritime law personal injury case establishing a federal admiralty rule on interspousal immunity and declining to look to local state procedural law, the court stated "A state law, even though it does not contravene an established principle of admiralty law will, nevertheless, not be applied where its adoption would impair the uniformity and simplicity which is a basic principle of the federal admiralty law. "

In *Genetics International v. Cormorant Bulk Carriers*, 877 F.2d 806 (9th Cir. 1989), the court held that a set-off against payment of freight charges is determined by federal maritime, not state law.

In *Daughtry v. Diamond M Co.*, 693 F.Supp. 856, 863 (E.D. Cal. 1988), the court applied federal law, not state procedural statutes dealing with good faith in settlements among joint tortfeasors in a Jones Act personal injury case; it quoted *Moragne v. State Marine Lines*, 398 U.S. 375, 401-02, 90 S.Ct. 1772, 1788, 26 L.Ed.2d 339, 357 (1970) recognizing a general maritime wrongful death action to assure "uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts . . . . [U]niformity . . . will give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country. [citation omitted]'" In *Ciolino v. Sciortino Corp.*, 721 F.Supp. 1491, 1495 (D. Mass. 1989), a Jones Act and general maritime law personal injury case, the court stated "because federal

substantive law controls the decision of this case, this court should apply" the federal *procedural* rule on amended complaints relating back to an earlier date.

The Federal Fifth Circuit has recently held the existence of a federal *procedural* defense, *forum non conveniens* (considered a "characteristic" feature of federal maritime law), justified reversing plaintiff's voluntary dismissal to prevent his refiling suit in state court where this defense would not be available. That is, the state court *would not be permitted* to take away a federal maritime procedural right. *Ikospentakis v. Thalassic Steamship Agency*, 915 F.2d 176 (5th Cir. 1990). *A fortiori* the state court must not be allowed to take away the federal maritime *substantive* rights at issue herein.

This Court itself in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222, 223, 106 S.Ct. 2485, 2494, 91 L.Ed.2d 174 (1986), supporting the uniformity of federal maritime law, referred to the "saving to suitors" clause which:

> [A]llows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse - *Erie*" doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.

In accordance with this principle, the court in *Icelandic Coast Guard v. United Technologies Corp.*, 722 F.Supp. 942, 949 (D. Conn. 1989) refused to apply state tort law which conflicted with applicable substantive maritime law.

Exxon Corp. v. Chick Kam Choo, 817 F.2d 307 (5th Cir. 1987), *reversed on other grounds*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988), a maritime wrongful death case, involved a conflict between state and federal procedural rules of *forum non conveniens*. Referring to *Offshore Logistics, Inc., supra*, the court said that when state court procedures conflict with maritime law "it is clear that they must yield." The court

explained: *"The 'reverse -* Erie' *question is whether the inconsistent state law, whether deemed a matter of substance or procedure, conflicts with maritime law."* (817 F.2d at 319, emphasis added). The *Exxon* court analyzed the factors favoring maritime law preemption of state law. Relevant here is the uniformity factor, *i.e.*:

> Whenever a uniform rule will facilitate maritime commerce, or, conversely, when non-uniform regulation will work a material disadvantage to commercial actors. . . . A corollary of this concept is the notion found in the *J. Ray McDermott & Co. [supra]* test of "characteristic features" or core principles of the maritime law. [citation omitted] Applying state law inconsistent with "characteristic features" would defeat the reasonably settled expectations of maritime actors. . . . Since uniformity is related to predictability and to reasonable legal expectations, it is of greatest importance when legal relations are not predictably related to a certain locale and its laws.

All this is generally true for maritime commerce and particularly true for the type of offshore maritime activities here, involving varied party and vessel locations.

Needed uniformity would surely be compromised if the law of each state could dictate who is to be the ultimate beneficiary of Jones Act and general maritime law personal injury actions. In this same way needed uniformity would be compromised if each state could dictate the ultimate beneficiary in maritime wrongful death and survival actions.

Would not a significant lack of uniformity exist in allowing seaman Smith in State A to determine through his testament the ultimate beneficiary of his maritime personal injury recovery, but in denying this right to seaman Jones in State B?

The issue of substantive beneficiary is similar to that before this Court in *Offshore Logistics, Inc., supra*, concerning the federal Death on the High Seas Act preemption of the Louisiana

state wrongful death statute which otherwise would have allowed recovery of non-pecuniary damages. This Court stated:

> However, the questionable practical significance of this difference in recovery [citation omitted] is far overshadowed by the potential for serious conflicts between DOSHA and state substantive law in such areas as limitations periods, *classes of beneficiaries*, and the definition of potential defenses. We defer to Congress' purpose in making a uniform provision for recovery for wrongful deaths on the high seas, an area where the federal interests are primary.

477 U.S. at 233 (emphasis added).

Here the personal injury occurred very predominantly or exclusively in international waters, "on the high seas." Here the "classes of beneficiaries" have been determined by Congress in the Jones Act and by the general maritime law. Here the state law should likewise defer to the federal purposes underlying uniformity of substantive beneficiaries.

If the several states apply varying rules, how will persons against whom maritime claims are made know the proper claimant for redress? As herein, how will defendants know the proper party with whom to discuss settlements of judgments on appeal?

The general features of this case, the determination of the substantive beneficiary of Jones Act and general maritime law causes of action, are of the character which requires uniformity to facilitate maritime commerce. The inquiry here is thus analogous to the admiralty jurisdiction inquiry before this Court in *Sisson v. Ruby*, 110 S.Ct. 2892, 2896 (1990), where the "potential disruption to commercial maritime activity" plainly satisfied the requirement.

Maritime substantive rights and duties should not form a patchwork across the nation. Significant substantive uniformity is needed here and throughout federal maritime law. *Moragne v.*

States Marine Lines, supra; *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 629-631, 79 S.Ct. 406, 409, 410, 3 L.Ed.2d 550, (1959); *Miles v. Apex Marine Corp.*, 111 S.Ct. 317 (1990).

C. Balancing of interests, state and federal.

Underlying the foregoing federal preemption jurisprudence, and the exceptions to federal preemption, is a balancing of state interests against federal interests. This balancing or "accommodation" of interests was explained by this Court in *Kossick v. United Fruit Co.*, 365 U.S. 731, 739, 81 S.Ct. 886, 892, 6 L.Ed.2d 56 (1961):

> [T]he process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern.

What are the interests, state and federal? The only Louisiana state interest is in having a simple, singular rule for *all* substitutions of a "legal successor" when a party dies at any time during litigation, including after final judgment but before resolution of an appeal. Louisiana would apply this single rule *regardless* of whether the substantive cause of action arose under its law or that of another jurisdiction, such as federal admiralty.

Here Louisiana has an insignificant interest in the seaman's suit and judgment. At the time of his death he was no longer domiciled in Louisiana, but rather had been domiciled in California for some two and a half years, including during most of the trial court proceeding and at the time of the judgment. Also the personal injury at issue herein did *not* occur primarily, if at all, in Louisiana territorial waters. Rather the injury was caused to the seaman by exposure to x-ray radiation, incident to pipe weld inspections, occurring over a period of several years. During that period of time, the vessels on which the seaman was working were located in various jurisdictions. The vessels' work was

located exclusively or very predominantly in offshore international waters well beyond Louisiana and other state territorial waters. The vessel work locations also included international waters offshore of Mexico and, during three periods, international waters offshore of Europe. Thus, even under the maxim *lex loci delicti*, state law would not apply.

Further, as discussed above, the seaman was domiciled in California for years before and continuing through the times of the judgment and of his subsequent death. Therefore the legal situs of the incorporeal moveable property right represented by his judgment, under the rule *mobilia sequuntur personam*, was California, not Louisiana. This is true under the laws of both California and Louisiana. *In re Burnison's Estate*, 204 P.2d. 330 (Cal. 1949), *aff'd U.S. v. Burnison*, 70 S.Ct. 503, 339 U.S. 87 (1950); *Succession of Lodato*, 250 So.2d 293 (La. App. 4th Cir. 1971); *Succession of Packwood*, 9 Rob. 438, 12 Rob. 366 (La. 1845).

Also, the decedent seaman's will was executed in, and under the laws of, California. Then the seaman died in California and his will was probated there on August 30, 1989. Further, the judgment was inventoried on November 6, 1989 as part of the estate in the California probate proceeding. All this occurred *before* the adopted children were substituted as parties in the Louisiana appeal on January 8, 1990. Note that under long-established California law, the right to a judgment, in favor of a plaintiff who died pending an appeal, belongs to the plaintiff's estate. *Fowden v. Pacific Coast Steamship Co.*, 149 Cal. 151, 86 P. 178 (1906); *Sherwin v. Southern Pacific Co.*, 158 Cal. 722, 145 P. 92 (1914).

So Louisiana's interest in the case was limited to providing, by virtue of the federal saving to suitors clause, the forum court for the litigation of two federal maritime causes of action. Thus the State of Louisiana has but a negligible interest in comparison with the State of California or the United States.

The United States' federal maritime interests are most sig-

nificant, markedly outweighing the interests of Louisiana and California. The first federal interest, as the sovereign who created the substantive rights, is the protection of its own statutorily (Jones Act) and judicially (general maritime law) created federal maritime rights. The integrity of these substantive maritime rights should be protected from their inception through final judgment and appeal. Otherwise the Congressional and judicial purposes of these rights will not be served if the rights are subject to deprivation under such circumstances.

The second federal interest is the promotion of uniformity in the substance and application of federal maritime law. Such uniformity aids maritime commerce, as discussed. Also see, *e.g., Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959); *Southern Pacific Co. v. Jensen, supra; Moragne v. States Marine Lines, supra; Kermarec v. Compagnie Generale Transatlantique, supra*; and *Miles v. Apex Marine Corp., supra.*

This Court, in similar choice-of-law cases, notably *Lauritzen v. Larsen*[3], has examined several factors in deciding whether to apply United States law or to apply foreign law to personal injury suits by seamen. "The broad principles of choice of law and the applicable criteria of selection set forth in *Lauritzen* were intended to guide courts in the application of maritime law generally."[4] The factors which are relevant here are: (1) the place of the wrongful act; (2) the domicile of the injured seaman; (3) the domicile of the defendant shipowner (or employer); and (4) the

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[3] 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970).

[4] *Romero v. International Terminal Operating Co.*, 358 U.S. at 382. This Court also noted "the place of contracting is largely fortuitous and of little importance in determining the applicable law in an action of marine tort." 358 U.S. at 383.

base of operations of the defendant shipowner. Here the wrongful act took place in international waters, the seaman's domicile during most of the trial court proceedings and at the time of the final judgment was California, the domicile of the defendant employer was Texas, and the principal place of business of the defendant employer was Texas. Thus Louisiana lacks the interests which would be shown by such factors.

This Court in *Kossick v. United Fruit Co., supra*, expressly analogized this balancing of interests to a conflict of laws situation. Also see *State Trading Corporation of India v. Assuranceforeningen Skuld*, 921 F.2d 409, 416 (2nd Cir. 1990), in which a Connecticut direct action statute, substantive in nature, was held inapplicable to a federal maritime suit under "federal choice of law rules" which prevent " 'substantial variation as result of choice of forum in the rights and duties arising from a given legal situation (citation omitted)' " which "would run counter to the strong federal admiralty interest of uniformity and predictability." Note well that the conflict-of-laws and choice-of-law authorities fully support the petitioner's position. RESTATEMENT (SECOND) OF CONFLICT OF LAWS *2d*, § 122, comment a, 351, 352 (1971), cited in *State Trading Corporation of India, supra*, discusses the factors to consider concerning the application of the law of the jurisdiction under which the right originated rather than the law of the forum. Of the two relevant factors discussed, one factor favoring the original (here federal) jurisdiction's law would be if the application of the local law "would be likely to affect the ultimate result of the case."

The second factor, the classification of the issue as "substantive," also favors applying the original jurisdiction's law. On this point Mr. Justice Harlan, while on the Court of Appeals for the Second Circuit, said in an admiralty context:

> In actions where the rights of the parties are grounded upon the law of jurisdictions other than the forum, it is a well-settled conflict-of-laws rule that the forum will apply the foreign substantive law....

Bournias v. Atlantic Maritime Co., 220 F.2d 152, 154 (2nd Cir. 1955); cited with approval in *Chevron Oil Company v. Huson*, 404 U.S. 97, 113, 92 S.Ct. 349, 358, 30 L.Ed.2d 296 (1972), (Douglas, J. concurring).

Also see RESTATEMENT (SECOND) OF CONFLICT OF LAWS *2d*, § 125, comment a (1971), stating "the local law of the forum as such will not... be applied when its application would substantially affect the rights and duties of the parties." Also see E.STIMSON, CONFLICT OF LAWS, at 28 (1963), stating "the true objective of conflict of law rules is that the outcome of the suit should be the same regardless of the jurisdiction in which it is brought," and at 29 stating "if there is doubt as to whether the law applied will affect the result, the law of the forum should *not* be applied." (emphasis added). Surely a forum law determining the ultimate beneficiary of the personal injury action does affect the "outcome" and the "result" of the case. This "outcome determinative" rule has governed in other federal maritime tort, saving to suitors clause cases in state courts. *Matter of Rederi [Dow Chem. Co.]*, 25 N.Y.2d 576, 581, 307 N.Y.S.2d 660, 255 N.E.2d 774 (1970) *cert. denied*, 398 U.S. 939, 90 S.Ct. 1844, 26 L.Ed.2d 272 (1970) (State courts must apply federal law "to secure a single and uniform body of maritime law."); *Lerner v. Karageorgis Lines*, 488 N.E. 824, 826 (N.Y. 1985); *Haggerty v. Moran Towing & Transportation Co.*, 556 N.Y.S.2d 314, 316 (A.D. 1 Dept. 1990). It is undeniable that had this action been brought in federal court, the federal maritime law would have applied and would have determined that the estate was the substantive beneficiary. Also see discussion at §§ II. B. and C., *infra*. The federal court would not have applied state law to the question.

Finally, see Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L.J. 333, 334 (1933), characterizing the correct test as "How far can the court of the forum go in applying the rules taken from the foreign system of the law without unduly hindering or inconveniencing itself?" At 349 Cook distinguishes between primary rights, secondary rights (both considered sub-

stantive), and tertiary rights (remedial or procedural rights) having to do with the mode of enforcing the prior existing and violated rights. In the instant case the petitioner's right to the judgment, as the personal representative of the deceased seaman who was awarded that judgment, is clearly substantive and may not rightfully be taken from her under a state forum procedure. Such rights of a seaman, as "ward of the admiralty" must be protected from encroachment.[5] *Garrett v. Moore-McCormack Co., supra.*

Such protection has also been extended by this Court to an ancillary estate administrator, like the petitioner, of a maritime tort decedent in order to preserve maritime substantive rights which otherwise would have been lost under state procedural law, concerning the amendment of a petition at a time when a new suit would be barred by a statute of limitations; "federal practice" was held to control in this wrongful death case. *Levenson v. Deupree*, 345 U.S. 648, 652, 73 S.Ct. 914, 916, 97 L.Ed. 1319 (1953).

A reasoned balancing of interests favors application of federal maritime law to the significant maritime legal issues herein. Otherwise irrational fortuities would control significant issues: the fortuities of which state holds the forum court, of whether the defendant appeals a final judgment, and of when the seaman dies. In *Exxon v. Chick Kam Choo, supra,* it was said that such fortuities, there the fortuity of diversity of citizenship, should not determine crucial aspects of litigation. (817 F.2d at 320).

II. ***Whether under federal maritime law the substantive beneficiary of the final judgment is the seaman's estate.***

Under federal maritime law the estate of the deceased is the proper party in interest when the plaintiff dies after obtaining a final judgment in his favor. In the present case, the state court

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[5] The ward of the admiralty concept is not needed in this case. This judgment belongs to the estate not because the deceased was a seaman, but because that is the federal law which would apply to anyone.

applied state law to find that the respondents, as the survival beneficiaries under Article 2315.1, were the proper parties to substitute substantively for the deceased. But clearly survival statutes, state or federal, are irrelevant to the present case in which the deceased seaman obtained a judgment before his death. *In effect*, the state court has made this case a *survival* case because that court applied the survival statute. It is important to distinguish the instant case from survival and wrongful death actions, which are the only two actions to which the respondents could have been entitled.

A. Not survival or wrongful death action.

The courts below have erroneously relied upon La.C.C. Art. 2315.1, a state tort *survival* statute. Addressing La.C.C.Art. 2315's prior survival subpart, which is now this same Art. 2315.1, a commentator has said:

> Certainly if the victim brings a suit and recovers an award for his injuries and then dies, the beneficiaries' survival action is merged into the prior judgment . . . .Since the beneficiaries are merely procedural representatives to assert a claim which the victim would have asserted if he were alive, they cannot assert a claim which the victim has already litigated and lost [or won, as herein].

Johnson, *Death On The Callais Coach*, 37 La.L.Rev. 1, 48 (1976). The point is that "survival" has to do with the action the victim could have brought to judgment but was prevented from so doing because of death. If he has brought the action to a judgment, then there is simply no action to survive. The victim has already before his death merged his action into a judgment. The purpose of survival is to prevent the death of the victim from eliminating a rightful action. If he has already been awarded the judgment, then survival, by its very nature, does not apply. *Comment, Survival Of Action In Article 2315 of the Louisiana Civil Code: The Victim's And The Wrongful Death Action*, 43 Tulane L.Rev. 330, 335, 336 (1969). F. HARPER, F. JAMES, & O. GRAY, THE LAW OF TORTS, 2d ed., Vol. 4., § 24.6, 471-472 (1986).

In a survival case under federal law, the enumerated beneficiaries named in the survival statutes or jurisprudence are those in whose favor the action lies (that is, any recovery will ultimately go to these beneficiaries). But where the deceased had initiated his action during life and had obtained final judgment in his favor before his death, this judgment is his property right and at his death becomes part of his estate to be distributed in accordance with the intestate or testate succession laws. *Connors v. Gallick*, 339 F.2d at 386, discussed above in § I.A.. *Connors* was a FELA case involving a railroad employee who died after receiving a trial court verdict and pending appeal. The Court noted that the employee's causes of action had been "merged into his judgment" and that the judgment "became part of his estate." In *Seaboard Air Line Ry. Co. v. Oliver*, 261 F.2d 1 (5th Cir. 1919), cited in *Connors, supra*, a case directly on point dealing with the FELA, the court addressed the question of whether § 59 of the act (the "survival" provision added in 1910 by amendment), could apply after the deceased had recovered a judgment for his personal injuries during his lifetime. The court found that it could not apply because the *employee's right of action* must "survive" to invoke § 59, and under the circumstances, the right of action had been terminated by the judgment. The right of recovery was merged in or extinguished by the judgment.

> If the claim for injury to the decedent was terminated in his lifetime, no claim exists at the time of his death to which to survival status could apply. Hence, if the decedent settled the claim, obtained judgment upon it, or suffered adverse judgment in an action on the claim, a subsequent action upon the claim by his personal representative or other successor is precluded, just as successive actions by the decedent himself would be precluded.

RESTATEMENT (SECOND) OF JUDGMENTS, § 45, comment b (1982). Also see Schumacher, *Rights of Action Under Death And Survival Statutes*, 23 Michigan L.Rev. 114, 117-118 (1924).

B. Cause of action, merged into final judgment, becomes property right of estate.

As discussed above in the context of survival actions, the plaintiff's cause of action was merged into his final judgment. When a plaintiff obtains a judgment in his favor, his cause of action is merged in the judgment. *Hamer v. New York R. Co.*, 244 U.S. 266, 61 L.Ed. 1125, 37 S.Ct. 511 (1916); *Kaspar Wire Works v. Leco Engineering and Machine*, 575 F.2d 530, 533 (5th Cir. 1978). The cause of action no longer exists, only the final judgment exists then. "When the plaintiff recovers a valid and final personal judgment, his original claim is extinguished and rights upon the judgment are substituted for it. The plaintiff's original claim is said to be 'merged' in the judgment." RESTATEMENT (SECOND) OF JUDGMENTS, § 18, comment a (1982). *Accord: e.g., Connors v. Gallick, supra. Tunnell v. Edwardsville Intelligencer*, 43 Ill.2d 239, 252 NE.2d 538 (1969), *cert. denied*, 397 U.S. 1021, 90 S.Ct. 1259, 25 L.Ed.2d 530 (1970); *Ahearn v. Goble*, 90 Colo. 173, 7 P.2d 409 (1932); *Mayor of City of Anniston v. Hurt*, 140 Ala. 394, 37 So. 220 (1904); *Brundrett v. Hargrove*, 204 Ark. 258, 161 S.W.2d 762 (1942); *Heuchert v. State Industrial Acc. Commission*, 168 Or. 74, 121 P.2d 453 (1942); *Rosenblum v. Ginis*, 297 Mass. 493, 9 N.E.2d 525 (1937); *Gordon v. Hillman*, 102 Wash. 411, 173 P.22 (1918); *Castelluccio v. Cloverland Dairy Products Co.*, 165 La. 606, 115 So. 796 (1927); *Fowden v. Pacific Coast Steamship Co., supra; Bailey v. Travelers Insurance Co.*, 383 S.W.2d 562 (Tex. 1964).

"It is also worthy of notice that with respect to the primary function of the doctrine of merger to bar subsequent actions on the original cause of action, the doctrines of merger and res judicata are identical, and both are grounded on the same fundamental precepts". 46 AM. JUR. 2D *Judgments*, § 384. In the present case, had the respondents brought a subsequent survival claim, such would be barred by the merger doctrine underlying the doctrine of *res judicata*. The respondents have no greater rights herein.

The time of the final judgment is the point at which the seaman's cause of action became merged into his judgment as a property right of his estate, even though an appeal was later taken. *Siberell v. St. Louis - San Francisco Ry. Co.*, 9 S.W.2d 912, 917 (Mo. 1928). *Accord: e.g., Variety Children's Hospital v. Perkins*, 382 So.2d 331 (Fla. App. 3rd Dist. 1980); *Bailey v. Travelers Insurance Co., supra*; 1 AM. JUR. 2D *Abatement, Survival, and Revival*, § 60 (1962). *Siberell* was a FELA death case in which the widow beneficiary died after judgment while the case was on appeal and the court treated the judgment as a property right which had vested in the deceased plaintiff's (the widow's) estate.

The court said the question was a "question of right, and not of procedure, depending upon the substance of the cause of action, and its solution must be sought in the statute giving the right of action". Both of these points support the application herein of federal maritime law; see § I A., B., and C., *supra*.

In *Siberell*, the judgment vested in the plaintiff before she died. The court held the cause of action merged in the judgment to be subject to the general law of property succession upon death. The court said:

> [I]t is as obvious as it is elementary that a final judgment is the end of litigation. That which up to the moment of the entry of a judgment for the relief sought was a matter in controversy becomes an absolute debt of one party to the other. The cause of action then has ceased to exist, being merged in the judgment.

"*After judgment* the right . . . .is a vested property right which passes under the statute of descent and distribution like any other personal property" 25A C.J.S. *Death*, § 40, at 699 (emphasis in original).

The law, that the merger of a cause of action into a final judgment is not affected by the appeal of that judgment, can be further shown because the merger doctrine is the basis for the doctrine of *res judicata* or claim preclusion. 46 AM. JUR. 2D *Judgments*, § 383. The finality of a judgment for merger

purposes is not affected by the taking of an appeal (nor by a motion for a new trial) unless the judgment be in fact set aside. RESTATEMENT (SECOND) OF JUDGMENTS, § 13, comment f. The "final judgment" and "judgment" referred to in the above quotations refer to a judgment final in the trial court and subject to appeal. The fact that a final judgment is on appeal does not affect its status as a final judgment. In fact, generally only a "final judgment" may be appealed, thus the fact that it is subject to appeal does not make the judgment any less "final." 28 U.S.C. § 1291. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978); *Matterhorn, Inc. v. NCR Corp.*, 727 F.2d 629 (7th Cir. 1984).

If the judgment is reversed on appeal, of course, the judgment is then a nullity. But until then, it has full force and effect. A judgment affirmed on appeal is "affirmed as of the date when it was rendered." *Coughlan v. District of Columbia*, 106 U.S. 7, 11, 1 S.Ct. 37, 40, 27 L.Ed. 74, 76 (1882). This is consistent with the federal rule concerning judicial interest on judgments. In a federal maritime tort case, as in federal cases generally, the judicial interest accrues from the date the final judgment is rendered, not the date the judgment is affirmed. 28 U.S.C. § 1961 (a). *Kolsopoulos v. Asturia Shipping*, 467 F.2d 91, 95 (2nd Cir. 1972), a maritime personal injury case, applied § 1961 based on this merger doctrine: "Once a claim is reduced to judgment, the original claim is extinguished and merged into the judgment; and a new claim, called a judgment debt arises. See Restatement of Judgments, § 47 (1942)." (citing the predecessor of RESTATEMENT (SECOND) OF JUDGMENTS, § 18 (1982)).

This same rule, merger of causes of action into a final judgment, is the long-established law of California, the state of domicile of the plaintiff and therefore the situs of the moveable property right represented by the judgment. *Fowden v. Pacific Coast Steamship Co., supra; Sherwin v. Southern Pacific Co., supra.* This is also the long-established law of Louisiana, the forum court. *Vincent v. Sharp*, 9 La.Ann. 463 (1854); *Castelluccio v. Cloverland Dairy Products Co., supra; Kirby v. Albert T J.*, 517

So.2d 974 (La. App. 3rd Cir. 1987). This is also the federal law. *Hamer, supra; Connors, supra; Kaspar Wire Works, supra.* This is also the federal maritime law. *Kolsopoulos, supra.*

C. Federal maritime law.

Maritime law has been held, "even though the action were brought in a state court," to be "Such law is that which the Congress has enacted or the Federal courts, sitting in admiralty or in the exercise of their maritime jurisdiction, have declared and would apply." *J.B. Effenson Co. v. Three Bays Corp., supra.* Therefore, all the federal cases relied upon in §§ II. A. and B., *supra*, as to the points of law applicable herein, constitute the federal maritime law which should be applied to the present case. *Hamer v. New York R. Co., supra; Coughlan v. District of Columbia, supra; Kaspar Wire Works v. Leco Engineering and Machine, supra; Kolsopoulos v. Asturia Shipping, supra* (a plaintiff's cause of action, at the time of a final judgment in his favor, is merged into the final judgment); *Bankers Trust Co. v. Mallis, supra; Matterhorn, Inc. v. NCR Corp., supra* (although appealable or appealed, a judgment remains a final judgment). *Connors v. Gallick, supra; Seaboard Air Line Ry. Co. v. Oliver, supra* (the Jones Act/FELA personal injury judgment belongs to the estate, not the survival beneficiaries).

Had the case herein been heard in the federal courts, Federal Rule of Appellate Procedure 43, Substitution of Parties, Subpart (a), "Death of a Party" would require the "personal representative of the deceased party," here the succession executrix, to be substituted as a party in place of the original plaintiff.

It has been held that under the comparable Federal Rule of Civil Procedure 25 (a), the trial court rule on the substitution of parties on death, only the succession representative is the proper party to be substituted. See *Marcano v. Offshore Venezuela*, 497 F.Supp. 204, 206-208 (E.D.La. 1980), a federal general maritime personal injury case, in which the court by analogy relied on the same requirement of procedural capacity as contained in the Jones Act and the Federal Employers Liability Act.

Also see *Asklar v. Honeywell, Inc.*, 95 F.R.D. 419 (D.Ct. 1982), (a federal Age Discrimination in Employment Act case) holding that federal rules on substitution of parties, "in an action based on federal substantive law . . ., control over inconsistent state statutes." The actions herein were also based on federal substantive law.

Federal Rule of Appellate Procedure Rule 43 (a) was in effect at the time of *Stein v. Sea-Land Services, Inc.*, 440 F.2d 1181 (5th Cir. 1971), where the seaman had received a trial court verdict in his lifetime for his personal injuries under the general maritime law of unseaworthiness. After the verdict, but before judgment was entered on the verdict, the seaman died. Thereafter, during the appeal, his widow and administratrix of his succession was substituted for the decedent as plaintiff-appellee and the case was affirmed in her favor. Subsequently the widow for herself asserted additional claims for wrongful death and survival in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974). In *Gaudet* this Court clearly differentiated between wrongful death and survival actions, on the one hand, and personal injury actions prosecuted to judgment by the plaintiff before death, on the other. There Justice Powell referred to the prior *Stein* case and noted without objection that "because Gaudet's death intervened between the jury verdict and the appeal, his recovery went directly to his estate, not to him personally." (414 U.S. 611, n. 23, Powell, J. dissenting). It was a foregone conclusion that, because the plaintiff died after verdict, the recovery went to his estate. The case herein is even stronger since the plaintiff died after being awarded a final judgment.

The very reasoning upon which *Gaudet* is founded dictates that obtaining a personal injury judgment during plaintiff's lifetime cuts off a survival action for the same damages. That reasoning was that the injury action and the wrongful death action were totally distinct, *i.e.*, they were actions for different injuries to different persons and thus one did not exclude the

other. Although this is true of wrongful death, it certainly is not true of survival, which is exactly the same as the personal injury claim and for the *same* damages to the *same* person. This supports the executrix's substitution herein and establishes the estate as the ultimate party in interest of the general maritime law judgment.

The instant case's Jones Act claim clearly is controlled by the holding in *Connors v. Gallick, supra*, where a railroad employee died after receiving a final judgment, but while a motion for a new trial was pending. The question before the court was whether the survivorship provision of the FELA (45 U.S.C. §59, incorporated by reference into the Jones Act), applied so as to entitle the daughter to the proceeds of a settlement received by the employee's estate. The court distinguished between the employee's own personal injury cause of action and the survival right of action based on that same cause of action and held that the survivorship provision did not apply since the employee's own personal injury cause of action had been merged into his final judgment, and thus there was no cause of action remaining to survive. The court explained:

> At the time the railroad filed its motion for a new trial, Gallick was its judgment creditor and it was his judgment debtor. We are impressed that Gallick's cause or causes of action ha[d] been merged in his judgment . . . . Gallick's death did not convert his judgment into a cause of action to be prosecuted for the benefit of his [survivors].

Thus the judgment and the resulting settlement belonged to the employee's estate:

> Gallick in his lifetime had prosecuted his own cause of action to judgment, and his death did not abate his action or vacate his judgment. The appellate proceedings did not wipe out his judgment [citation omitted] . . . .Gallick died possessed not of an unlitigated cause of action, but of a judgment which became part of his estate.

Connors v. Gallick, 339 F.2d at 386.

This is dispositive of this Jones Act/FELA *and* the general maritime question since "the similarity in purpose and function of the Jones Act and the general maritime principles of compensation for personal injuries, admit of no rational differentiation of treatment for choice of law purposes," *Romero v. International Terminal Operating Co.*, 358 U.S. at 382.

Connors v. Gallick, supra, states the FELA, Jones Act, and general maritime law controlling this case. Under this federal law, the decedent's judgment is an asset of his estate.

CONCLUSION

The Louisiana court's action in this matter interferes with necessary supremacy and uniformity of the substantive federal maritime law. No recognized exception justifies this interference with a substantive maritime right of the deceased seaman's estate. Petitioner submits that the Louisiana court has erred, and that its action must be reversed. It is imperative that this Court order summary reversal or grant certiorari to protect the judgment rights of the deceased seaman, and to preserve the constitutional uniformity of federal maritime law needed here.

This Court, the United States Courts of Appeals and District Courts, and the state courts have all uniformly held that questions of *substance*, such as presented in this case, must be decided under the uniform federal law; that the law applied in saving to suitors clause cases in state courts or federal civil courts must conform to that which would be applied in federal admiralty. Had this Jones Act and general maritime action been brought in federal court, that court would not have applied state law to the question of substantive beneficiary in interest. It would have applied the federal maritime law which is contrary to the state law as applied by the state court in this case. From the *Southern Pacific Co. v. Jensen* case, *supra*, in the early part of this century, to the recent *Miles* case, *supra*, substantive uniformity and fed-

eral supremacy have been regarded by this Court as the hallmarks of federal maritime law. Since the *Chelentis* case, *supra*, this Court has consistently held that these virtues also should inform cases brought in state court under the saving to suitors clause. Both federal and state saving clause jurisprudence have reinforced this principle to the present day. The action of the Louisiana court in this case is thus contrary to nearly a century of federal and state jurisprudence and should not be allowed to stand.

Respectfully submitted,

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APPENDIX

25TH JUDICIAL DISTRICT COURT FOR THE PARISH OF PLAQUEMINES
STATE OF LOUISIANA

NO. 29-703 DIVISION "B"

STEPHEN A. MISTICH

VERSUS

PIPELINES, INCORPORATED, ET AL.

FILED: April 28, 1989 (Signed) Merlene M. Barthelemy
DEPUTY CLERK

JUDGMENT

This matter came on for trial on the 11th day of April, 1989 and concluded on the 20th day of April, 1989.

PRESENT: Lawrence D. Wiedemann, William Hazlaris and Mark A. Pivach, Attorneys for Plaintiff

James F. Holmes, J. Warren Gardner and Jeffrey Christovich, Attorneys for Defendant, Brown and Root, Inc.

The Court, after hearing the evidence, the argument of counsel, and considering the exhibits admitted into evidence by the parties, finds as a matter of fact, as follows:

Plaintiff, Stephen A. Mistich, was unnecessarily and improperly exposed to excessive levels of radiation as a seaman aboard vessels owned by Brown and Root, Inc., Pipelines, Inc., Lennard Pipelines, Inc., Sea-Con Services, Inc., and Santa Fe International, Inc., over the period June 11, 1976 - November 18, 1985.

The exposure to which plaintiff, Stephen A. Mistich, was subjected during his employments with Lennard Pipelines, Inc., Pipelines, Inc., and Sea-Con Services, Inc., was not causally [sic] related to plaintiff's condition because the employment periods

were subsequent to the latency period for chronic myelogenous leukemia diagnosed on January 19, 1986.

The exposure period during plaintiff's employment with Santa Fe International, Inc. (seven days) is questionably related due to the latency period, but, if related, is de minimis when compared to the exposure period during plaintiff's extended employment with Brown and Root, Inc. over the period 1976 - 1984 (approximately 1073 days).

The Court finds, as a matter of fact, that Brown and Root, Inc. was negligent and that the various vessels owned by it on which plaintiff worked over the aforesaid period were unseaworthy. The court also finds, as a matter of fact, that the negligence of Brown and Root, Inc. was a cause-in-fact, and the unseaworthiness of Brown and root, Inc.'s vessels was the cause-in-fact of plaintiff's chronic myelogenous leukemia due to exposure to excessive levels of radiation; each of the aforesaid theories of fault contributing equally to plaintiff's injuries and damages.

The Court finds, as a matter of fact, that plaintiff did not contribute in any way to the injuries, or damage, sustained by him.

The Court apportions the fault of plaintiff's Jones Act/ General Maritime employers, as follows:

Brown and Root, Inc.	100%
Pipelines, Inc.	0%
Lennard Pipelines, Inc.	0%
Sea-Con Services, Inc.	0%
Santa Fe International, Inc.	0%

The Court finds that plaintiff is entitled to compensatory damages in the sum of THREE MILLION ONE HUNDRED FORTY-SEVEN THOUSAND SIX HUNDRED EIGHT AND NO/100 ($3,147,608.00) DOLLARS, itemized as follows:

Past Medical	$ 73,298.78
Past lost wages	83,912.00
Future medical	186,000.00
Future lost wages	804,397.00

Past and Future physical pain and suffering	800,000.00
Past and Future emotional injury, mental pain and suffering	1,200,000.00

The Court further finds, as a matter of fact, that the conduct of Brown and Root, Inc. was willful and in gross disregard of plaintiff's rights, and accordingly, awards to plaintiff punitive damages in the sum of FOUR MILLION AND NO/100 ($4,000,000.00) DOLLARS.

Finally, the Court utilizes its discretion and awards pre-judgment interest from the date of judicial demand on one-half (1/2) of the amount awarded in compensatory damages, at the legal rate provided under Louisiana law, and herewith taxes all costs against defendant, Brown and Root, Inc.

JUDGMENT READ, RENDERED AND SIGNED at Pointe-a-la-Hache, Louisiana, this 28th day of April, 1989.

(SIGNED) EMILE E. MARTIN
JUDGE

UNITED STATES DISTRICT COURT [sic]

[LOUISIANA STATE COURT OF APPEAL]

FOR THE FOURTH CIRCUIT

NO. 89-CA-1420

STEPHEN A. MISTICH
VERSUS
PIPELINES, INC., ET AL.

APPEAL FROM PLAQUEMINES 25TH
JUDICIAL DISTRICT COURT, NO. 29-703

MOTION FOR SUBSTITUTION OF PARTIES

NOW INTO COURT, through undersigned counsel, come Brandon L. Mistich, Rebecca Mistich Terrase, and Patricia A. Mistich as natural tutrix of Shawn A. Mistich, legal survivors of original petitioner, Stephen A. Mistich, who move of this Court to be recognized as party plaintiffs in this action pursuant to Louisiana Code of Civil Procedure Art. 801; Rule 2-9 of Uniform Rules - Court of Appeal; and Louisiana Civil Code Art. 2315.1, and upon suggesting the following:

I.

Judgment was rendered on April 28, 1989 in favor of original plaintiff, Stephen A. Mistich and against defendant, Brown & Root, Inc. in the above entitled action for damages.

II.

Original plaintiff, Stephen A. Mistich, died on May 14, 1989.

III.

There exists no surviving spouse of the deceased, Stephen A. Mistich.

IV.

Brandon L. Mistich, Rebecca Mistich Terrase and Shawn A. Mistich are the sole surviving children of the deceased, Stephen A. Mistich, and therefore, the proper parties to be substituted in the appeal as per the authorities cited. Proof of their quality is attached as Exhibit 1 to this Motion.

Patricia A. Mistich is the natural mother and tutrix of minor Shawn A. Mistich. Proof of her capacity is attached as Exhibit 2 to this Motion.

WHEREFORE, surviving children, Brandon L. Mistich, Rebecca Mistich Terrase, and Patricia A. Mistich as natural tutrix of Shawn A. Mistich, urge this Honorable court to recognize their right of substitution under the authorities previously cited, and that they be substituted as party plaintiffs and appellees herein for original plaintiff, now deceased, Stephen A. Mistich.

IT ORDERED that Brandon L. Mistich, Rebecca Mistich Terrase, and Patricia A. Mistich as natural tutrix of Shawn A. Mistich, survivors of the deceased, Stephen A. Mistich, be hereby recognized and substituted as party plaintiffs and appellees in the above entitled and numbered cause.

New Orleans, Louisiana, this 8th day of January, 1990.

(SIGNED) PATRICK M. SCHOTT
JUDGE

RESPECTFULLY SUBMITTED:

WIEDEMANN & FRANSEN

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STEVEN A. MISTICH	*	NO. 89-CA-1420
VERSUS	*	COURT OF APPEAL
BROWN & ROOT, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * * * * * * * * *

The Petition for Intervention filed by Hettie M. Minnick is denied. Under Louisiana Code of Civil Procedure Article 801 and Louisiana Civil Code Article 2315.1 the proper party to be substituted as the legal successor are the children of the deceased plaintiff.

New Orleans, Louisiana, this 28th day of December 1990.

(SIGNED) RFB,III
Judge Rudolph F. Becker, III

(SIGNED) DAB
Judge Denis A. Barry

(SIGNED) JBA
Judge Joan Bernard Armstrong

The Supreme Court of the State of Louisiana

STEPHEN A. MISTICH

VS. NO. 91-0C-0164

PIPELINES INC. ET AL

- - - - - - -

IN RE: Minnicks, Hettie M.; - Other(s); Applying for Supervisory and/or Remedial Writs; Parish of Plaquemines 25th Judicial District Court Div. "B" Number 29-703; to the Court of Appeal, Fourth Circuit, Number 89CA-1420

- - - - - - -

February 22, 1991

Denied.

JCW

WFM

JLD

LFC

PH

LEMMON, J. would grant the writ

Supreme Court of Louisiana
February 22, 1991

(SIGNED) Frans J. Labranche, Jr.
Clerk of Court
For the Court

Supreme Court U.S.
FILED
JUN 18 1991
OFFICE OF THE CLERK

(2)

NO. 90-1836

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HETTIE M. MINNICKS,
as Executrix of the Succession
of Stephen A. Mistich
Petitioner,

versus

BRANDON L. MISTICH,
REBECCA MISTICH TERRASE,
and PATRICIA MONROE MISTICH, as natural tutrix
of SHAWN A. MISTICH

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA STATE COURT OF APPEAL,
FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED FOR REVIEW

Whether this Honorable Supreme Court of the United States, The Supreme Court of the State of Louisiana, and the Louisiana Court of Appeal, Fourth Circuit, all erred in denying the substitution and intervention of decedent's executrix into the pending litigation in which decedent's children had correctly been substituted as plaintiffs-appellees.

LIST OF PARTIES

The parties involved include those set forth in the caption, as well as Brown & Root, Inc., an original defendant in this matter. The parent and subsidiary companies of Brown & Root, Inc. have been previously listed in the Petition for Writ of Certiorari. These parties represent the identical ones involved in the previous Petition for Writ of Certiorari filed by the same party on the same issue back on December 13, 1990.

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DECISIONS BELOW

1. Judgment in favor of original plaintiff Stephen A. Mistich in the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, dated April 28, 1989.

2. Order of the Louisiana Court of Appeal, Fourth Circuit, substituting decedent's children as plaintiffs-appellees, dated January 8, 1990.

3. Denial by the Louisiana Court of Appeal, Fourth Circuit, of the executrix's motion to be substituted, as well as denial of motion to stay proceedings filed by Brown & Root, Inc., dated June 1, 1990 (Appendix 1).

4. Denial by the Louisiana Court of Appeal, Fourth Circuit, of peremptory exception of no right of action filed by Brown & Root, Inc., dated September 4, 1990 (Appendix 2).

5. Denial by the Supreme Court of the State of Louisiana of application for supervisory and other writs filed by the executrix, dated September 14, 1990 (Appendix 3).

6. Denial by the Louisiana Court of Appeal, Fourth Circuit, of the petition for intervention filed by the executrix, dated December 28, 1990 (Appendix 4).

7. Denial by the Supreme Court of the State of Louisiana of application for writ of certiorari or review filed by the executrix, dated February 22, 1991 (Appendix 5).

8. DENIAL BY THE SUPREME COURT OF THE UNITED STATES OF PETITION FOR WRIT OF CERTIORARI FILED BY THE EXECUTRIX, DATED FEBRUARY 19, 1991 (Appendix 6).

STATEMENT OF JURISDICTION

The jurisdiction of this Honorable Court is questioned to the extent that this Honorable Court has already addressed and disposed of a previous Petition for Writ of Certiorari filed by the executrix on December 13, 1990, pertaining to precisely the issue presented herein.

STATEMENT OF THE CASE

On December 2, 1986, Stephen A. Mistich (hereinafter sometimes referred to as "Mistich") filed suit in the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, pursuant to the "saving to suitors" clause, seeking tort damages for his injuries against Brown & Root, Inc. and other defendants. Several weeks prior to trial, Mistich settled his claims against all co-defendants, except Brown & Root, Inc., and therefore released the former.

After a full trial on the merits lasting seven days, judgment was rendered on April 28, 1989 in favor of Mistich and against Brown & Root, Inc. awarding $3,147,000.00 in compensatory damages and imposing $4,000,000.00 in punitive damages. Reasons for Judgment, thoroughly explaining the trial court's decision, were issued on May 25, 1989.

Subsequent to the rendering of the judgment and prior to the issuance of the reasons for same, Mistich died.

Brown & Root, Inc. suspensively appealed to the Louisiana Court of Appeal for the Fourth Circuit on May 31, 1989.

On January 8, 1990, decedent's children, Brandon L. Mistich, Rebecca Mistich Terrase, and Patricia A. Mistich, as natural tutrix of Shawn A. Mistich, were substituted as proper party plaintiffs based upon Louisiana Code of Civil Procedure Article 801, Rule 2-9 of Uniform Rules of Louisiana Courts of Appeal, and Louisiana Civil Code Article 2315.1.

On March 12, 1990, the Court of Appeal entertained oral arguments by Brown & Root, Inc. and the aforenamed children on behalf of the decedent Mistich. No other representative of Stephen A. Mistich existed at this time.

On April 4, 1990, nearly one year after judgment was rendered and nearly one month after oral arguments were heard by the Court of Appeal, the executrix of decedent's estate was confirmed in such capacity and sought to be substituted as the sole proper party plaintiff-appellee.

Interestingly enough, while recognizing that this case arises under the Jones Act, 46 U.S.C. Section 688, and the general maritime law, the executrix conceded that Louisiana Code of Civil Procedure Article 801 and Rule 2-9 of the Uniform Rules of Louisiana Courts of Appeal, controlled the substitution of parties.

However, the executrix erred in relying upon Louisiana Code of Civil Procedure Article 801(2) and not 801(1). The executrix clearly misinterpreted Article 801 in support of her assertion that the estate was the correct party to be substituted for the decedent.

After supporting the applicability of Louisiana procedural law, the executrix changed horses and cited two federal maritime cases, Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974) and Connors v. Gallick, 339 F.2d 381 (6th Cir. 1964) as authority for her proper party status, citing the dissenting opinion of Justice Powell in Gaudet as authority.

On June 1, 1990, the Court of Appeal correctly denied the executrix's Motion to Substitute, citing Nathan v. Touro Infirmary, 512 So.2d 352 (La. 1987), a case fully supporting the position that Louisiana Code of Civil Procedure Article 801(2) applies strictly to property damage or contract cases, but not to personal injury cases.

On June 26, 1990, the executrix applied for supervisory and other writs to the Louisiana Supreme Court, which writs were

denied on September 14, 1990, further confirming that the children of Mistich are the proper parties in interest to this lawsuit.

On September 4, 1990, the Court of Appeal, in denying Brown & Root, Inc.'s Peremptory Exception of No Right of Action, ruled:

> **MOTION IS DENIED.**
>
> The peremptory exception of no right of action brought by Brown & Root, Inc. is denied. Under the circumstances of this case the children of Stephen A. Mistich were merely substituted as proper parties plaintiff in a personal injury claim which their father had already asserted and had obtained judgment. This is not a situation where there exists a "survival action" claim to be prosecuted and therefore the rules under the Jones Act and general maritime law relative to what party has the right to assert the claim does not apply.
> (See Appendix 2.)

Having been unsuccessful in her prior attempts to be recognized as the real party in interest and justly so, on November 14, 1990, the executrix planned a new strategy, couched her arguments in new terms, and filed a different pleading, a Motion to Intervene, all in an effort to accomplish the same goal.

However, this time, the executrix pulled out all of the stops. After conceding that the procedural substitution was indeed a matter governed by Louisiana state law, she lent a significant portion of her supporting memorandum to matters both irrelevant and which were neither in the record nor before the Court of Appeal.

In sheer desperation, the executrix referred to a will that purportedly left Mistich's sole surviving children next to nothing, thus deliberately insinuating a negative relationship between the decedent and his children, seeking to invoke prejudice. Although respondents vehemently dispute such a relationship, this discussion is germane to no aspect of this appeal and has absolutely no relevance in this Honorable Court's decision-making process. The conclusion that the executrix's motive was to invoke prejudice is inescapable given the fact that in a prior pleading, her Memorandum in Opposition to Brown & Root, Inc.'s Motion to Stay, the executrix admitted:

> "Mr. Mistich's testacy or intestacy is completely irrelevant to the legal issues in the appeal of this case to this Court. Brown & Root, Inc.'s motion for a stay does not and cannot expressly assign any actual legal significance herein to the will. Indeed, there is none."

Therefore, as expected, on December 28, 1990, the Court of Appeal denied the executrix's Motion to Intervene, ruling that in accordance with La. C.C.P. Article 801 and La. C.C. Article 2315.1, the proper parties to be substituted as the legal successors are the children of Mistich.

On January 17, 1991, the executrix once again applied for a writ of certiorari or review to the Louisiana Supreme Court, which writ was once again denied on February 22, 1991.

Concurrently, the executrix asked this Honorable Supreme Court of the United States to review this issue when she filed a Petition for Writ of Certiorari on December 13, 1990. In that writ application, executrix argued her position from a procedural and substantive viewpoint. This Honorable Court apparently saw no merit in such arguments and denied the petition on February 19, 1991.

Now, however, the executrix appears before this Honorable Court once again arguing the same issues she did previously, but contending that her argument is somehow different this time. Interestingly, the executrix fails to mention her previous writ application to the Supreme Court of the United States in her list of the pertinent decisions below.

SUMMARY OF ARGUMENT

The issue before this Honorable Court regarding the executrix's right to intervene or be substituted in this personal injury litigation in place of decedent has been argued twice before the Louisiana Court of Appeal, Fourth Circuit, twice before the Louisiana Supreme Court, and once before this Supreme Court of the United States. Each and every time, the executrix has been correctly denied any right of intervention into the pending proceedings. Yet she has now returned once more with the same argument made to this Honorable Court in her previous writ application, thus compelling decedent's children to respond once again to an issue that has already been adjudicated. Respondents submit that such abuse of the appellate process is a waste of time and resources for both the courts and the litigants involved.

ARGUMENT

Once again, the sole surviving children of decedent, Stephen A. Mistich, are forced to respond to yet another writ application filed by Hettie M. Minnicks, the executrix of decedent's estate, whose obvious intention is to interfere with the progress of the pending personal injury litigation and somehow obtain the fruits of a judgment which lawfully belong to decedent's children. The

executrix has presented her argument over and over again, yet has been correctly denied any right to intervene in the litigation by both the state courts and this Honorable Court.

The chronology of the various pleadings filed by the executrix need not be recited at this point, as it has previously been set forth in this opposition. However, it is important to note that the executrix initially asserted the application of state procedural law, declaring that it mandated her substitution as the proper party appellee in the proceedings. After having this attempt fail throughout the appellate ladder, the executrix planned a new strategy, abandoned her previous assertions that state procedural law applies, and declared that it is really the federal substantive law that governs whether she is allowed to become involved in the litigation. It is clear that the executrix is merely hoping to achieve her ends one way or the other. Her intention, to lay claim to the significant money judgment to which decedent's children are rightly entitled, is readily apparent and should not be supported.

Furthermore, the executrix all but ignores the fact that she previously filed a writ application to this Honorable Court on the same issue she is now presenting. In fact, she even fails to advise this Honorable Court of same in her listing of decisions below. The truth, however, is that this writ application is redundant, requesting relief which has been denied once before by this United States Supreme Court. One need only review the executrix's prior writ application filed on December 13, 1990 to realize the duplicative nature of the arguments made. A comparison of the "Questions Presented For Review" in each writ clearly illustrates the repetition:

QUESTIONS PRESENTED FOR REVIEW

In a Jones Act and general maritime law personal

injury case in state court under the "saving to suitors" clause, when the plaintiff seaman dies after award of a trial court judgment in his favor but before decision on the defendant's appeal:

1. Does federal maritime law or state law determine who is the proper beneficiary of the judgment and who is the proper party to be substituted for the deceased seaman.

2. Does federal maritime law designate the seaman's estate as the proper beneficiary of the judgment, and designate his personal representative, the executrix of his estate, as the proper party to be substituted for the deceased seaman.

(Prior Writ Application)

QUESTIONS PRESENTED FOR REVIEW

In a Jones Act and general maritime law personal injury case in state court under the "saving to suitors" clause, when the plaintiff seaman dies after award of a final judgment in his favor:

1. Does federal maritime law or state law determine the substantive beneficiary of the final judgment?

2. Does federal maritime law designate the seaman's estate as the substantive beneficiary of the final judgment?

(Present Writ Application)

Contrary to what petitioner now contends, she presented both procedural and substantive arguments in her prior writ. This Honorable Court apparently considered her position and correctly denied the writ on February 19, 1991. Respondents respectfully submit that her return to this forum now is a frivolous action and constitutes abuse of the appellate process, resulting in a waste of time and resources for the Court as well as the litigants.

Finally, although respondents will defer to their brief filed in opposition to the executrix's initial writ application as being relevant herein, it is important to stress the untenable nature of petitioner's position, as evidenced by her reliance on the case of Connors v. Gallick, 339 F.2d 381 (6th Cir. 1964), which she asserts to be controlling and dispositive of the issue at bar.

That case involved a railroad employee who died pending appeal subsequent to receiving a judgment in the trial court. The court held that the survivorship provision of FELA did not apply to a settlement and that the judgment became part of decedent's estate to the exclusion of a daughter, who had never known her father. A careful reading of this case reveals the important fact that **the litigation was no longer pending**; the judgment had been finalized by settlement. Subsequent to the settlement, the daughter filed suit to participate in the settlement. The court, of course, held that the settlement funds went to the estate and not to the questionable daughter, as the settlement funds recovered in the instant case from ancillary defendants became part of Mr. Mistich's estate upon his death. The court further stated in Connors, at page 385, that had the litigation continued and the trial court judgment been reversed or a new trial been granted, the action would continue for the benefit of the listed beneficiaries. Appellees submit that is precisely what is transpiring in this matter: an action in which a judgment has been rendered, but which is not definitive, is pending and continues for the benefit

of the designated beneficiaries upon the death of the original plaintiff.

Should the trial court judgment be reversed or a new trial granted, the children of Stephen A. Mistich would irrefutably be the only parties to maintain the litigation. Hettie M. Minnicks, the executrix, would have no right at all. Respondents submit, therefore, that if uniformity is to be served, the correct decision has been made by the courts substituting the children as the proper parties in interest.

Although Connors v. Gallick can be considered an aberration in that it discusses 45 U.S.C. Section 59 in a context where it is not necessary, it is obvious that the executrix's reliance on this case is grossly misplaced. The case admittedly is dispositive and controlling of the issue at bar, but with the exact opposite result of what the executrix desires.

The executrix refuses to view the litigation as pending. She wants to treat the judgment as final and enforceable and is prepared to make the judgment part of the estate at this time. Clearly, this is not the situation that exists. The action is still pending and there is no definitive judgment. Therefore, under Connors v. Gallick, and all relevant state and federal law, the action survives for the benefit of decedent's children.

CONCLUSION

The decisions by this Honorable Supreme Court of the United States, the Supreme Court of the State of Louisiana, and the Louisiana Court of Appeal, Fourth Circuit, were all correct in denying the executrix's numerous attempts to intervene and in maintaining that the sole surviving children of Stephen A. Mistich are the proper parties to continue decedent's personal

injury litigation. This latest writ application reiterates what the executrix has previously argued to this Honorable Court and reflects her desperate effort to obtain the fruits of a judgment not rightfully hers.

Respondents submit that there is no federal issue involved here, much less any conflict with federal decisions. The executrix's argument for federal uniformity is merely a "red herring" to persuade this Honorable Court to review the proper determinations made by the various courts that have already adjudicated this matter. In fact, uniformity is served much more significantly by the decisions from which she appeals in that, should there be a reversal of the judgment or a new trial granted, the children would once again be the only proper parties plaintiff. The executrix then, as now, would have no right to intervene.

Respondents respectfully submit that Hettie M. Minnicks' writ application be denied once again based on the foregoing opposition and the opposition presented previously in conjunction with petitioner's prior writ application.

Respectfully submitted,

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APPENDIX 1

STEPHEN A. MISTICH	*	NO. 89-CA-1420
VERSUS	*	COURT OF APPEAL
BROWN & ROOT, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * * * * * * * * *

ORDER

Motion to stay proceedings pending determination of proper party substitution is denied.

Motion to substitute Hettie M. Minnicks executrix of the Succession of Stephen A. Mistich is denied. Nathan v. Touro Infirmary, 512 So.2d 352 (La. 1987).

New Orleans, Louisiana, this 1st day of June, 1990.

(SIGNED) RFB
Judge Rudolph F. Becker, III

(SIGNED) DAB
Judge Denis A. Barry

(SIGNED) JBA
Judge Joan Bernard Armstrong

APPENDIX 2

STEPHEN A. MISTICH	*	NO. 89-CA-1420
VERSUS	*	COURT OF APPEAL
BROWN & ROOT, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * * * * * * * *

PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

MOTION IS DENIED.

The peremptory exception of no right of action brought by Brown and Root, Inc. is denied. Under the circumstances of this case the children of Stephen A. Mistich were merely substituted as proper parties plaintiff in a personal injury claim which their father had already asserted and had obtained judgment. This is not a situation where there exists a "survival action" claim to be prosecuted and therefore the rules under the Jones Act and general maritime law relative to what party has the right to assert the claim does not apply.

New Orleans, Louisiana this 4th day of September, 1990.

(SIGNED) RFB
Judge Rudolph F. Becker, III

(SIGNED) DAB
Judge Denis A. Barry

(SIGNED) JBA
Judge Joan Bernard Armstrong

APPENDIX 3

THE SUPREME COURT OF THE STATE OF LOUISIANA

STEPHEN A. MISTICH

VS. NO. 90-OC-1241

PIPELINES INC. ET AL

- - - - - - - - - - -

IN RE: Minnicks, Hettie M.; - Other(s); Applying for Supervisory and/or Remedial Writs; to the Court of Appeal, Fourth Circuit, Number 89CA-1420; Parish of Plaquemines 25th Judicial District Court Div. "B" Number 29-703

- - - - - - - - - - -

September 14, 1990
Denied.

JCW
WFM
JLD
LFC
PH

LEMMON, J., would grant the writ.

Supreme Court of Louisiana
September 14, 1990

(SIGNED) JTO
Deputy Clerk of Court
For the Court

APPENDIX 4

STEPHEN A. MISTICH	*	NO. 89-CA-1420
VERSUS	*	COURT OF APPEAL
BROWN & ROOT, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * * * * * * * *

The Petition for Intervention filed by Hettie M. Minnick is denied. Under Louisiana Code of Civil Procedure Article 801 and Louisiana Civil Code Article 2315.1 the proper party to be substituted as the legal successor are the children of the deceased plaintiff.

New Orleans, Louisiana, this 28th day of December, 1990.

(SIGNED) RFB
Judge Rudolph F. Becker, III

(SIGNED) DAB
Judge Denis A. Barry

(SIGNED) JBA
Judge Joan Bernard Armstrong

APPENDIX 5

THE SUPREME COURT OF THE STATE OF LOUISIANA

STEPHEN A. MISTICH

VS. NO. 90-OC-0164

PIPELINES INC. ET AL

- - - - - - - - - - -

IN RE: Minnicks, Hettie M.; - Other(s); Applying for Supervisory and/or Remedial Writs; Parish of Plaquemines 25th Judicial District Court Div. "B" Number 29-703; to the Court of Appeal, Fourth Circuit, Number 89CA-1420

- - - - - - - - - - -

February 22, 1991
Denied.

JCW
WFM
JLD
LFC
PH

LEMMON, J., would grant the writ.

Supreme Court of Louisiana
February 22, 1991

(SIGNED) FJL
Clerk of Court
For the Court

APPENDIX 6

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 19, 1991

Mr. Lawrence D. Wiedemann
821 Baronne St.
P. O. Box 30648
New Orleans, LA 70190-0648

RE: Hettie M. Minnicks, Executrix of the Succession
of Stephen A. Mistich
v. Brandon L. Mistich, et al
No. 90-1082

Dear Mr. Wiedemann:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

SIGNED WKS
William K. Suter, Clerk

(3)

Supreme Court, U.S.
FILED
SEP 23 1991
OFFICE OF THE CLERK

NO. 90-1836

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

HETTIE M. MINNICKS
as Executrix of the Succession
of Stephen A. Mistich
Petitioner,

versus

BRANDON L. MISTICH,
REBECCA MISTICH TERRASE,
and PATRICIA MONROE MISTICH, as natural tutrix
of SHAWN A. MISTICH
Respondents.

ON PETITION FOR WRIT
OF CERTIORARI TO THE LOUISIANA COURT
OF APPEAL, FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

Petitioner wishes to reply to five points made in the Brief of Respondents in Opposition to the Petition, and to bring a recent development to the attention of the Court.

1.

The Respondent's Opposition is based on the erroneous assumption that this Honorable Court has already ruled on the same issue presented in the Petition now before this Court. Before this Court previously was the June 1, 1990 denial by the Louisiana Court of Appeal, Fourth Circuit, of the executrix's motion to be substituted as proper party plaintiff-appellee. Now before this Court is the December 22, 1990 denial by the same Court of Appeal of the executrix's Petition of Intervention for the decedent's estate as the substantive beneficiary in interest of the decedent's own final judgment.

Respondents mischaracterize the prior substitution ruling as being the same "issue" as the present substantive intervention ruling. See present Opposition, pages i, ii, vi, 3, 4, 5, 6. Yet in Respondents' prior Opposition (in U.S.S.Ct. No. 90-1082), page vi, they had stated the prior state court ruling "involved merely the procedural substitution of parties" and, on page 11, they had said "it is the denial of this procedural substitution alone that is before this Court." Also Respondents had stated that the substantive beneficiary issue was a "new issue" not addressed by the courts below." (prior Opposition, page 5). The Respondents squarely contradict themselves by now arguing that this substantive beneficiary issue has already been decided!

Although Petitioner for the sake of completeness previously had included arguments concerning the substantive beneficiary issue, Petitioner noted to this Court in her prior Petition that the substantive intervention had been filed and, in her prior reply brief, that the Court of Appeal had denied the intervention. Evidently since the Louisiana Supreme Court had not then ruled

on the expressly substantive intervention, this Court declined to grant writs at that time.

2.

Throughout the Opposition Respondents continue to mistakenly treat this case as a survival case. Respondents state "under *Connors v. Gallick*[1] and all relevant state and federal law, the action *survives* for the benefit of decedent's children." (Opposition, page 9, emphasis added). The Respondents erroneously assume that the decedent's death after final judgment converted his personal injury judgment into a survival cause of action for them.

On pages 8 and 9 of their Opposition, Respondents attempt to distinguish the *Connors* decision because the judgment there had been settled and so the original personal injury litigation was no longer pending *at the time of the decision*. However it is not the time of the decision which is relevant. Rather it is the time of the tort victim's death in relation to the time of the final personal injury judgment. On this point, the present case is the same as *Connors*, since in both cases final judgments were entered before the victims' deaths (but while litigation was pending, there being a motion for a new trial or an appeal filed).

Thus the *Connors* decision and the present case are based upon the distinction between a personal injury cause of action by the victim himself, and a survival cause of action. In this regard the *Connors* court stated:

> Gallick's cause or causes of action having been merged in his judgment....Gallick's death did not convert his judgment into a cause of action to be prosecuted for the benefit of his [survival beneficiaries]....[T]he *only* event that could give [the survival beneficiary] any right would be the granting of a new trial.

---

[1] 339 F.2d 381 (6th Cir. 1964).

339 F.2d at 386. (emphasis added). No such event such as the granting of a new trial or a reversal of the judgment has occurred herein.

Note the court in *Connors* expressly disagreed with the Respondents' position herein. After stating that if the judgment were reversed and a new trial granted after the victim's death, then there would be a survival action, the court continued:

> [P]laintiff's position is that Gallick's death at a time when his judgment might have been set aside[,] if the pending motion for new trial were granted[,] had identical results.
>
> *We are unable to agree with plaintiff's position.*

339 F.2d at 385, 386 (emphasis added).

3.

The Respondents state "that there is no federal issue involved here, much less any conflict with federal decisions." (Opposition, page 10). However the long-standing jurisprudence cited in the Petition refutes this statement. This jurisprudence continues in the very recent case of *Associated Electric Cooperative, Inc. v. Mid-America Transportation Co.*, 931 F.2d 1286 (8th Cir. 1991), holding federal maritime law, not contrary state law, applicable to the effect of a settlement on the substantive rights of contribution or indemnity between joint tort-feasors.

4.

Respondents mistakenly claim that Petitioner "conceded" that state procedural law controlled the substitution of parties (Opposition, page 2). Yet a reading of Petitioner's memorandum to the state Court of Appeal shows Petitioner argued that *both* federal and state law provided that she, as executrix, was the proper party to be substituted. See prior Opposition, Appendix

3. Petitioner's subsequent writ application to the Louisiana Supreme Court also argued that *both* federal and state law required her substitution. (See prior Reply Brief of Petitioner, Appendix, page A-2).

5.

Respondents discuss the relevancy of the deceased plaintiff's will (Opposition, page 4). Petitioner is quoted from her opposition to the defendant-appellant's motion for a stay of the appeal, which motion had relied upon the will as a reason for granting a stay. The point being made by Petitioner was that the decedent's testacy or intestacy was not relevant to determining that his executrix was the proper party to be substituted. In either case the judgment rights belonged to the estate.

6.

A recent development should be brought to this Court's attention. As discussed on page 23 of the Petition herein, under the law of California, where the decedent was domiciled, the right to a judgment in favor of a plaintiff who died pending an appeal belongs to the plaintiff's estate. The judgment herein was inventoried on November 6, 1989 as part of the estate in the California probate proceeding. Recently, on July 29, 1991, after notice to the Respondents herein, the California court issued a order holding that the decedent's personal injury judgment "*is properly an asset of the estate and subject to the decedent's testamentary disposition*" (emphasis added; see Appendix, page A-1). Thus the Louisiana state court's ruling conflicts, not only with federal maritime law, but also with the law and court order of the State of California, the situs of the incorporeal moveable property right represented by the decedent's judgment.

CONCLUSION

For all the reasons expressed by Petitioner, the Opposition of Respondents is ill-founded. So this Court should order summary reversal or grant certiorari to protect the substantive rights of the deceased seaman and to preserve the constitutional uniformity of federal maritime law.

APPENDIX

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

Estate of:	)	Case Number: A 148591
	)	
STEPHEN ARTHUR MISTICH,	)	Order Settling First
	)	Account Current And
	)	Report Of Executor And
Decedent.	)	Order For Its Settlement
	)	

Petitioner, HETTIE MINNICKS, as executor of the Will of STEPHEN A. MISTICH, deceased, having filed her First Account Current and Report of Executor and Petition for its settlement, and the same, as supplemented, having come on regularly for hearing on July 24, 1991 in Department 3 of the above entitled Court, the Honorable *TULLY H. SEYMOUR*, Judge/ Commissioner presiding, the court now finds:

1. *That all notices of said hearing have been given as required by law.*

2. All acts and transactions of the petitioner, HETTIE MINNICKS, during the period of the report are truly shown and should be approved, and all allegations of the report and Petition for its settlement are true.

3. That the First Account Current for the period of August 24, 1989 through and including April 18, 1991 is full, true and correct and should be settled, allowed and approved as filed.

4. *That the decedent died testate on May 14, 1989, a resident of the State of California, County of Orange.* That decedent's Will, dated March 3, 1989, was admitted to Probate

by order of this Court on August 24, 1989 and that the petitioner qualified as executor thereof and Letters Testamentary were issued to her on September 6, 1989. At all time since, the petitioner has been, and now is, duly appointed, qualified and acting as executor of decedent's will.

5. That notice to creditors has been published for the period and in the manor prescribed by law. All known and reasonably ascertainable creditors of the estate have received notice and the time for filing claims has expired.

One creditor's claim has been filed and presented to the estate, has been accepted and paid.

6. The debts of the decedent, including costs of administration through the account period, funeral expenses and expenses of last illness have been paid and the estate is now and at all times has been solvent.

7. *The Inventory and Appraisement of the estate as returned and filed November 6, 1989, is a true and correct report of the estate's assets.*

8. All appropriate tax returns have been filed to date.

9. The estate's assets consist solely of the separate property of decedent.

10. The transaction and acts as reported by the petitioner, pursuant to paragraph 13 of the Report and Petition for Settlement, are accurately shown and should be approved ratified.

11. *The Judgment of Stephen A. Mistich vs. Pipelines, Inc., et al, Number 29-703, is properly an asset of the estate and subject to the decedent's testamentary disposition.*

THEREFORE, it is ordered and judged that:

1. The First Account Current be settled, allowed and approved;

2. All acts and proceedings of the petitioner as disclosed in the First Account Current and Report, as supplemented, be

confirmed, ratified and approved;

3. *That the assets of the estate, as set forth in the First Account Current and Report of the estate are assets of this estate and subject to testamentary disposition in this proceeding;*

4. That the estate shall be brought to a close within twelve (12) months of the date of this order or a further status report shall be filed by said date.

Dated: July 29, 1991

(Signed) Tully H. Seymour
JUDGE/COMMISSIONER OF THE
SUPERIOR COURT

[emphases added]